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No. 10-965

IN THE

Supreme Court of the United States

CITY OF LOVELAND, OHIO,
Petitioner,

v.

BOARD OF COMMISSIONERS OF
HAMILTON COUNTY, OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

PATRICIA A. MILLETT
AKIN, GUMP, STRAUSS,
HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4450

R. GUY TAFT
FRANKLIN A. KLAINE, JR.
JOSEPH J. BRAUN
STRAUSS & TROY
Federal Reserve Building
150 East Fourth Street
Cincinnati, OH 45202
(513) 621-2120

STEPHEN P. SAMUELS
Counsel of Record
NICOLE R. WOODS
SCHOTTENSTEIN, ZOX
& DUNN, CO., LPA
250 West Street
Columbus, OH 43215
(614) 462-2700
ssamuels@szd.com

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In an effort to divert attention away from the very real circuit conflicts over "arising under" jurisdiction, respondents devote much of their opposition to characterizing Petitioner Loveland's complaint as seeking "modification of the consent decree," which respondents then assume self-evidently arises under federal law. That argument is wrong at every level.

First, Loveland's state law contract claim has nothing whatsoever to do with modifying a consent decree. Loveland seeks only to exercise its state law right to terminate a state law contract with another state subdivision. The legal obligations applicable to

the Polk Run System itself are not at issue in that contract action, and the parties to the Consent Decree remain free to move the district court to bring Loveland into the Consent Decree litigation if it prevails in its contract action.

Second, respondents' assumption that *every* action involving both a federal consent decree and state law issues automatically arises under federal law begs the questions presented. Specifically, the circuits are poles apart in their interpretation of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006), regarding whether the federal courts have jurisdiction over state law claims that entail the mere application of settled federal law to the facts of a state law claim. Three circuits have ruled that such claims do not arise under federal law. But two other circuits, including the Sixth Circuit here, have interpreted *Grable* and *Empire* much more expansively, and allow federal court jurisdiction over such claims. In addition, the Sixth Circuit's decision squarely conflicts with the law of the Seventh Circuit regarding whether federal question jurisdiction exists when the only federal element in the litigation is the alleged potentially adverse impact of a state claim on a federal consent decree.

The Board argues that the conflicting circuit decisions are not germane because they arrived in federal court via removal rather than as original actions. That misses the point. "Arising under" jurisdiction is determined by the same analysis whether the case is originally filed in, or is removed to, federal court. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987). This case *could* have materialized in federal court in

one of three ways—a declaratory action by the Board before Loveland filed in state court; a removal of Loveland's complaint; or, as occurred here, an original action after the state complaint was filed—but all present exactly the same legal questions: whether a case "arises under" federal law when it entails nothing more than the application of settled federal "law" to facts of a state law claim, and whether a consent decree constitutes federal law for purposes of 28 U.S.C. § 1331. Moreover, because the Board's federal action is simply the obverse of Loveland's state action—the Board alleging that a state contract law claim is barred—the facts to which the analysis is applied are also the same. Loveland wants to enforce its contract; the Board wants to prevent Loveland from doing so.

The Board tries to reformulate the case as petitioner's effort to "modif[y]" a consent decree." (Opp'n Br. 22.) That is not what Loveland's state law complaint requested and, in any event, the Board's repeated recitation of this mantra does not alter the fact that the Sixth Circuit upheld jurisdiction because Loveland's state law claim might adversely impact the Consent Decree.

Third, the Board reasons that the federal courts *must* be a proper venue because the state trial court dismissed Loveland's complaint. Putting aside that the dismissal is currently under appellate review, the Board's argument overlooks that, by the time the state court dismissed Loveland's complaint, two decisions from the federal court had already laid claim over the contract dispute. The state court obediently followed the federal court's direction.

I. THE DECISION OF THE SIXTH CIRCUIT EXPANDS A PRE-EXISTING CIRCUIT CONFLICT.

A. The Sixth Circuit's Opinion Conflicts With Three Other Circuits Concerning Whether the Mere Application of Federal Law to the Facts of State Law Claims Creates "Arising Under" Jurisdiction.

The Board strives mightily to ignore the existence and importance of the now-expanded circuit conflict over whether the mere application of settled federal law to a state law claim creates "arising under" jurisdiction within the meaning of 28 U.S.C. § 1331. The Board tries to reduce Loveland's position to an argument that the Sixth Circuit merely erred in applying the facts. (Opp'n Br. 13.) But Loveland's point is that the Sixth Circuit created an erroneous rule of law by holding that the "fact" that the Board sought to apply settled federal law to the specific facts of this dispute created "arising under" jurisdiction. Loveland seeks this Court's review not to resolve facts, but to address a real and outcome-determinative jurisdictional conflict among the circuits.

The Board backhands the circuit conflict on the ground that the decisions of the Seventh, Fifth, and Ninth Circuits were removal cases. (Opp'n Br. 14.) That is true. It is also irrelevant. The analysis of "arising under" jurisdiction is the same for removal and original cases. "[I]n order to properly remove an action pursuant to [§ 1441(a)], petitioners must demonstrate that original subject-matter jurisdiction lies in the federal courts." *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 33 (2002). The Board's

silent assumption that its "original" action to apply a consent decree to a state law contract claim arose under federal law begs the very questions presented: whether a federal consent decree automatically constitutes federal law for purposes of "arising under" jurisdiction, and, if so, whether the mere application of settled federal law to the facts of a state law claim is sufficient to trigger "arising under" jurisdiction.

This case captures that problem squarely because the facts at issue in Loveland's state action and the Board's federal action are the same, and the Board's legal claim is simply the negative of Loveland's complaint. Loveland's complaint requested a declaration that "the City of Loveland's notice of termination [of the 1985 agreement] . . . set for January 1, 2010 is reasonable." (Compl. D. Ct. ECF Doc. No. 1 at Ex. D.) The Board's complaint asked the district court to "declar[e] that Loveland cannot unilaterally terminate the 1985 Agreement between the Board and Loveland." (*Id.* at 17.) Put simply, enforcing state law contract rights and foreclosing the exercise of state law contract rights are state law *and* state court issues. Whether Loveland, if it prevails in state court, should be made a party to the Consent Decree is an entirely separate question that arises, if at all, only after resolution of the state law contract question. Furthermore, the Board, at most, is attempting to raise the Consent Decree as a defense to a state law contract claim, but the mere presence of a potential federal defense to state law litigation is not sufficient to create "arising under" jurisdiction.

Beyond those procedurally mistaken arguments, the Board has no answer to the conflict. It dedicated only a single sentence to each of the three cases that conflict with the decision below. (*See* Opp'n Br. 14-

15.) But the conflict is direct, the implications for federalism and comity considerable, and the consequences outcome determinative. The three circuits that are at odds with the Sixth Circuit have interpreted *Grable* and *Empire* as creating a jurisdictional distinction between state law claims that require the interpretation of federal law, and those that involve only the application of settled federal law to the facts of the state claim. The Sixth Circuit and the Federal Circuit have a substantially more expansive view of federal jurisdiction. Based on how they read *Grable* and *Empire*, federal jurisdiction exists where—as here—a state law claim involves the mere application of federal law to facts.

The Seventh Circuit held that a state law tort claim that implicated federal aviation regulations did not create arising under jurisdiction because the case presented "a fact-specific *application* of rules that come from both federal and state law rather than a context free *inquiry into the meaning* of a federal law." *Bennett v. Sw. Airlines, Co.*, 484 F.3d 907, 910 (7th Cir. 2007) (emphasis added). So too does this case, but the outcome is different.

The Fifth Circuit also distinguished jurisdictionally between a federal law's application to facts and a substantial dispute over its interpretation. *Singh v. Duane Morris, LLP*, 538 F.3d 334 (5th Cir. 2008). It held that a legal malpractice claim filed in state court, the resolution of which required the application of federal trademark law, did not arise under federal law. "[T]his case involves no *important issue of federal law*. Instead, the federal issue is predominantly one of *fact*," namely the application of settled federal trademark law to the facts of a state law malpractice claim. *Id.* at 339 (emphasis added).

The Ninth Circuit is in accord. For a federal law to be sufficiently at issue to justify federal jurisdiction, the party's claim "must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another." *Int'l Union of Operating Eng'rs v. Cnty. of Plumas*, 559 F.3d 1041, 1044 (9th Cir. 2009) (quoting *Gully v. First Nat'l Bank*, 299 U.S. 109, 112-13 (1936)). Again, those jurisdictional outcomes ought not to turn on whether the paper initiating federal court jurisdiction is called a "complaint" or a "notice of removal," but on the peripheral role of federal law in what is fundamentally a state law claim.

The circuits' dichotomous interpretation of *Grable* and *Empire* is outcome determinative, allowing vastly different kinds and numbers of cases to enter the federal courts. The core of the circuit conflict is starkly captured by comparing *Singh* to *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld*, 504 F.3d 1262 (Fed. Cir. 2007). In *Air Measurement*, the court found jurisdiction based on facts indistinguishable from *Singh*: a legal malpractice claim that required the application of federal law to determine the merits of the state law claim. The Federal Circuit, like the Sixth Circuit, interprets *Grable* much more expansively: "*Grable* did not hold that only state law claims that involve constructions of federal statute or pure questions of law belonged in federal court." *Id.* at 1272.

Had the Sixth Circuit followed *Bennett*, *Singh*, and *International Union*, and held that the mere application of federal law to facts is insufficient to confer federal jurisdiction, it would have dismissed the complaint. This Court's review is necessary so that the

federalism-rooted limitations imposed on the jurisdiction of federal courts can be consistently and correctly applied by all the circuits.

B. The Sixth Circuit's Decision Conflicts with The Seventh Circuit Regarding Whether a State Law Claim's Adverse Impact on a Federal Consent Decree Justifies Federal Jurisdiction.

The split between the Sixth Circuit and the Seventh Circuit exists at a second level, specifically, whether a state law claim's adverse impact on a federal consent decree begets federal jurisdiction. The Seventh Circuit's decision involved a state law claim that would "effectively frustrate . . . implementation of [a] consent decree" by drying up its source of funds. *In re the Application of Cnty. Collector*, 96 F.3d 890, 892 (7th Cir. 1996). Nevertheless, the court denied federal jurisdiction holding that "a state law claim does not present a federal question merely because it adversely impacts the terms of a federal consent decree." *Id.* at 896-97. Any argument that adverse impact to a federal consent decree supports federal jurisdiction is "inconsistent with Supreme Court precedent." *Id.* at n. 14.

That view of federal court "arising under" jurisdiction flatly contradicts what the Sixth Circuit held here. The Sixth Circuit predicated federal jurisdiction on its conclusion that Loveland's termination of its contract with the Board might have an adverse impact on the Consent Decree. (App. 11a.) The Board's claim that the Sixth Circuit did not rely upon "'possible interference' with or an adverse impact on a federal consent decree" (Opp'n Br. 21) is belied by the Board's repeated objection that jurisdiction was

proper because petitioner was (in its view) attempting to "modify" the consent decree. Putting aside that the resolution of the state law contract claim is entirely independent of the separate questions of what Loveland's and the Board's obligations might be under the Consent Decree if Loveland prevails, the Board's argument is simply the "frustration" argument rejected by the Seventh Circuit clothed in a different verb choice.[1]

II. THE SIXTH CIRCUIT'S DECISION, WHICH SANCTIONS THE USE OF A DECLARATORY JUDGMENT ACTION TO ALLOW A FEDERAL COURT TO WREST A CONTRACT CLAIM FROM THE STATE COURT WHERE IT WAS ORIGINALLY AND PROPERLY FILED, WRONGFULLY ALLOWS A SIGNIFICANT EXPANSION OF FEDERAL COURT JURISDICTION OVER MATTERS THAT HAVE HISTORICALLY BEEN RESERVED TO THE STATES.

The Board contends that federalism principles were satisfied because the state court dismissed Loveland's complaint. (Opp'n Br. 16.) This "no foul" call encapsulates the Board's failure to appreciate that the Sixth Circuit's jurisdictional aggrandizement caused very real harm. The state court's dismissal was the direct result of the federal court's assertion of juris-

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[1] *If* the state court rules in Loveland's favor and, *if* as a result, the parties to the Consent Decree believe it is necessary for Loveland to be bound by, or the Board relieved from, Consent Decree obligations pertaining to Polk Run, the Civil Rules provide multiple avenues for doing so. *See, e.g.*, Fed. R. Civ. P. 14, 15, 20, 60(b), and 60(d).

diction. The Board filed its motion to dismiss the state court complaint just one day *after* it filed its federal court complaint. Between that date and the date the state court dismissed Loveland's complaint, the district court made it crystal clear to the state court that it had taken jurisdiction over, and intended to decide, Loveland's contract claim.

More importantly, the state trial court dismissed Loveland's suit not for its own lack of jurisdiction over the contract claim, but on the ground that suit was premature. Accordingly, even if the state court's ruling is affirmed on appeal, this case is not remotely moot and this Court's intervention is needed to ensure that Loveland can reinstitute its suit against the Board[2] once it becomes ripe.

III. THE SIXTH CIRCUIT'S DECISION PRESENTS THE FAR-REACHING QUESTION WHETHER DUE PROCESS PERMITS A NON-PARTY TO BE BOUND BY A FEDERAL CONSENT DECREE SOLELY BECAUSE ITS CONDUCT ALLEGEDLY INDUCED RELIANCE.

The Board's central argument against review of the question "whether a nonparty may be bound through conduct inducing reliance on others," *Taylor v. Sturgell*, 553 U.S. 880 (2008), exposes the central flaw running throughout its opposition to certiorari. The Board asserts that "[t]he Sixth Circuit specifi-

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[2] As the United States and the other regulators were not parties to the 1985 Agreement, they are not appropriate, much less necessary, parties to the contract litigation. Loveland did not need to name them any more than a plaintiff would need to add the defendant's creditors because an adverse judgment might affect the defendant's ability to pay his debts.

cally found that 'Loveland's contention that it is not bound by the consent decree [to be] accurate . . . .'"[3] (Opp'n Br. 25.) That is precisely Loveland's point.[4] It is *not* a party to the Consent Decree, and thus all of the Board's arguments that Loveland is trying to modify the Consent Decree fall apart. A non-party's enforcement of its purely state law rights against a state entity does not "modify" a federal consent decree, especially when neither the elements of the state law action nor the relief sought require any interpretation of the decree. Because Loveland is not a party to the Consent Decree, the intrusiveness of federal jurisdiction is compounded in this case—the federal court jumped in front of a state court to address a state law claim between two political subdivisions just to apply a consent decree to a city that is not a party to it.

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[3] The Court actually said that "Loveland's contention that it is not bound by the consent decree, while accurate, is *immaterial*" because "Loveland forfeited its rights to contest the effects of the consent decree by unreasonably sitting on its rights." (App. 17a (emphasis added).)

[4] Notably, the Board does not challenge Loveland's contention regarding the ramifications of the court's decision—that it poses a potential obstacle to *numerous* persons whose rights are affected by the implementation of federal consent decrees to which they are not parties. That impact is what justifies the Court's review of this question.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PATRICIA A. MILLETT
AKIN, GUMP, STRAUSS,
HAUER & FELD, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4450

R. GUY TAFT
FRANKLIN A. KLAINE, JR.
JOSEPH J. BRAUN
STRAUSS & TROY
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& DUNN, CO., LPA
250 West Street
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